PART II

Distribution of Powers Between Federal Government and Member Units

135. Introduction

Does the federal government or its component units represent the nation externally, conclude international agreements, and render such agreements municipally applicable? It is into these problems that I shall now proceed to inquire. In a first section, I shall consider the nature of the federal state. In a first chapter, I shall then investigate the legal position and responsibility of the federal state and its member units under international law. In a brief second chapter, I shall outline the distribution of powers with respect to diplomatic and consular representation in foreign states and in international organizations. In a third chapter, I shall discuss the issue of what organ is to make and perform international agreements in federal states. I shall devote a few remarks to Austria, India and the USSR and shall then concentrate on five federal states, Canada, Australia, the Federal Republic of Germany, Switzerland and the USA.

136. The Notion of the Federal State

The federal principle is of an intricate and intractable complexity, fluid and adaptable, fragile and yet realistic. It is the result of growth and experience, a sort of a constant gamble, a permanent, delicate study in equilibrium. Its aim is to establish a "société des sociétés" (MONTESQUIEU), combining internal pluralism and integration with external uniformity and representation, alliance and co-ordination with unity and subordination, autonomy and liberty with security and authority, self-government with checks and balances[1]. The shape of federations may

[1] See generally The Federalist Nos. 3—5, 9—11, 22, 42, 80; A. V. DICEY, Introduction to the Study of the Law of the Constitution (10th ed. by E. C. S. Wade 1959) 141—44; HAY 79—101; M. IMBODEN, Die staatsrechtliche Problematik des schweizerischen Föderalismus, 74 ZSR 209—41 (1955); P. LERCHE, Föderalismus als nationales Ordnungsprinzip, 21 VVDStRL 66—104 (1964); A. T. MASON, The Nature of Our Federal Union Reconsidered, 65 Political Science Quarterly 502—21 (1950); M. MOUSKHÉLY, La théorie du fédéralisme, in 2 Etudes SCELLE 397—414 (1950); 1 SCELLE, Précis 187—206, 210—19.

vary according to the times, situations, ideologies, the objects and goals of federation, and the historical, geographical, social, racial, religious, economic, cultural, linguistic and educational background of the peoples involved.

Strictly normlogical theories have never been capable of completely grasping the spirit of federalism[2]. For, all in all, there is no single specific yardstick by which a federal state can be distinguished from a unitary state, on the one hand, a confederation on the other[3]. The federal state is not a compact of sovereign states, as the CALHOUN-SEYDEL nullification theory and Quebec's compact theory would have it. Nor is sovereignty divided between the federal government and the member units, as KENT, TOCQUEVILLE and WAITZ have proclaimed. Nor is the federal state a tripartite scheme divided into a constitution of the whole, a federal government and the members, as KELSEN and similarly HAENEL and GIERKE have argued. The residuum of powers may rest with the federal government (Canada) or the member units. The members may or may not (Canada) be equally represented in the federal legislature. A federal court may or may not (Switzerland) have power to judge invalid federal statutes which encroach on the competence of the member units. Autonomy may be granted to members of federal states, but also to separate regions in otherwise unitary states (Italy). Federal states may be created by constitution or treaty. Confederations, just like federal states, may have power to operate directly on individuals (the *Zollverein*), to levy taxes (the Swiss Federal Pact of 1815), to restrict the autonomy of members (the German Confederation of 1820). What remains, then, is a variety of flexible criteria.

A federal state can be distinguished from a unitary state, (1) if its members enjoy a constitutionally protected sphere of autonomy, and (2) if they participate in federal organs, particularly (3) if the constitution guarantees the members' right to participate in decisions concerning the delimitation of their spheres of competence.

[2] *Accord*: D. SCHINDLER sen., Verfassungsrecht und soziale Struktur (3d ed. 1950) 112—14. For some searching studies see, nevertheless, E. BOREL, Etude sur la souveraineté et l'état fédératif (Diss. Geneva 1886); J. KUNZ, Die Staatenverbindungen 61—144, 595—713 (1929); L. LE FUR, Etat fédéral et confédération d'Etats (Diss. Paris 1896); M. MOUSKHÉLY, La théorie juridique de l'état fédéral (Diss. Paris 1931); M. USTERI, Theorie des Bundesstaats (Diss. Zürich 1954); K. C. WHEARE, Federal Government (4th ed. 1964).

[3] *Accord*: R. L. BINDSCHEDLER, Rechtsfragen der Europäischen Einigung 22—36 (1954); 1 SCELLE, Précis 192—200. Cf. 2 DAHM VR 122—28.

A federal state can be distinguished from a confederation, (1) if the federal government has power to operate directly on individuals, (2) if its competences are relatively large and not limited to a narrowly defined, functional goal, and (3) if the mutual relations between the member units are governed by municipal, federal law (or "international law by analogy"), not by international law [4].

A federal state exists, in the last analysis, (1) if a majority of the citizens forming the state's public opinion consider the complex character of their state as enriching rather than hampering, (2) if this majority seeks both internal pluralism and external unity, internal liberty and external force, and (3) if the conviction of the citizens is based on the presence of an organic union, founded on common bonds.

CHAPTER 1

Federal States and International Law

137. Outline

This chapter contains three sections. In a first section, I discuss the position of federal states in international law: does international law accept the treaty-making authority of the federal government as full and paramount? Or does it make mandatory a complete federal treaty-making competence? Or does it, on the contrary, limit the fullness of such competence?

In a second section, I inquire into the position of the member units of federal states under international law. Can member units conclude international agreements, and if so, in their own right or as agents of the federal government? Are member units "subjects of international law"?

In a third section, I investigate problems of international responsibility in federal states. Who is responsible if an international agreement concluded by the federal government is not executed or is violated? Who is responsible in the case of agreements concluded by member units? If either the federal government or the member units enter into agreements in violation of the constitutional distribution of powers, are such agreements nevertheless internationally valid and binding?

[4] To what extent mutual relations between member units are governed by either international or internal constitutional law is controversial. Cf. W. B. COWLES, 74 RC 659—754 (1949 I); W. SCHAUMANN, 19 VVDStRL 86—130 (1961); H. SCHNEIDER, *id.* at 1—33.

138. The Principle

The conduct of foreign relations is determined by both international and municipal law. Let us first inquire into the position of international law, if any, towards federal states. What attitude does it take with regard to the competence and the responsibility of the federal government and its member units?

As to the federal government, the answer is clear: from the standpoint of international law, the federal state is a fully sovereign state [1]. It is alone competent to declare war and make peace. With negligible exceptions, it has alone authority to send and receive diplomatic envoys (Nos. 151—52). It has the sole right to conclude political treaties and alliances (No. 181). The international agreements into which the federal government enters, prevail everywhere over the law of the member units (No. 154).

The statement that the federal state is a sovereign state in international law demands elaboration in two directions. First, does international law require that the federal state be treated like a unitary state (No. 139)? If no, does it prevent the federal government from making treaties concerning subject-matters that are otherwise within the competence of the member units (No. 140)?

139. No National Limitations upon the Federal Treaty-Making Power?

The federal state, we have seen, is a sovereign state in international law. SCELLE and POTTER have argued that the national state possesses its treaty-making power by virtue of international, not national, law. International law, they maintain, bestows plenary powers and does not permit the adoption of procedures seriously impairing the exercise of the treaty-making power. It prevents, therefore, the federal state from pleading its federal character on the international plane. The federal state cannot say it is unable to enter into a certain treaty because it is limited by the federal character of its municipal constitution [2].

[1] 1 F. BERBER, Lehrbuch des VR 144—46 (1960); BERNHARDT 12—16, 41—43; 1 CAVARÉ DIP 419—22; GHOSH 1—39, 72—73; 2 HYDE IL 1388—90; KUNZ, *supra* No. 136, 121—22, 630—33, 659—65; MOSLER in Festschrift Thoma 130—31, 138—39, 172; MOUSKHÉLY, *supra* No. 136, n. 2, at 153, 278—89; 1 OPPENHEIM-LAUTERPACHT IL 175—76; SOHN-SHAFER 236.

[2] G. SCELLE, 46 RC at 396—97 (1933 IV); P. B. POTTER, 28 AJIL at 462—74 (1934).

It is no doubt correct that international law regards the states as being invested with complete power [3], — to that extent SCELLE and POTTER are certainly right. In the *Wimbledon* Case, the Permanent Court of International Justice remarked that "the right of entering into international engagements is an attribute of State sovereignty" [4]. Whereas today, in view of the modern international organizations, capacity to conclude international agreements can no longer be linked with sovereignty, nonetheless, the state's capacity in international law remains full and plenary. It is necessary, however, to make the distinction emphasized by HYDE between "the capacity of the United States to contract with other States, and the authority of the Federal Government to act in behalf of the nation" [5], the former being complete, inherent in nationhood and hence not susceptible to delegation, the latter pertaining to the exercise of a function and therefore susceptible to delegation.

Most writers agree that international law leaves it to the nation-states to designate the organs exercising the foreign affairs power; this is portrayed as an emanation of the states' freedom of auto-organization [6].

Federal constitutions and/or supreme courts do indeed regulate the exercise of the nation's treaty-making power, witness Canada, which does not permit the federal government to execute international agreements in spheres that are otherwise within the competence of the provinces (No. 160). In the United States, Switzerland and Australia, the federal governments are legally free; yet their treaty-making policy is marked by considerable restraint and is in fact inhibited by internal policies (Nos. 179, 173, 165). Such restraint is perfectly permissible since international law does not oblige nation-states to ratify treaties (No. 36). In the present-day world, international law does not and should not compel federal states to enter into all sorts of international agreements regardless of considerations of internal policy and constitutional limitations. No such claims have been made in past judicial decisions or diplomatic practice. Rather, the technique of the federal state-clause (No. 183) manifests endeavors to acknowledge the special situation of federal states. What

[3] The words are borrowed from MCNAIR 335. Art. 6 of the Vienna Conference's Draft Convention on the Law of Treaties reads: «Every State possesses capacity to conclude treaties», U. N. Doc. A/CONF.39/27 (1969), p. 4.

[4] P. C. I. J., Ser. A, No. 1 (1923), 25. Cf. Judge Anzilotti in *Customs Régime between Germany and Austria,* P. C. I. J., Ser A/B, No. 41 (1931) 58—59; MCNAIR 754—57.

[5] 2 HYDE IL 1389.

[6] GECK 77—92, 232—34; CH. ROUSSEAU, 93 RC at 412, 473 (1958 I); H. SCHEUBA-LISCHKA, Verweisung im VR, in 3 STRUPP-SCHLOCHAUER 586—87 (1962); W. SCHÜCKING, Ann. Inst. Int. Dr. Pub. 1930 225—27, Cf. *supra* No. 11e.

international law can and does require is that international agreements concluded by the federal government be performed, no matter how competence is distributed within the federal state (No. 146).

The argument presented by SCELLE and POTTER is a deduction from the monistic construction of international law, which views municipal law as derived or "delegated" from the hierarchically superior international law. The two authors do not argue that it should be impossible for the federal state to decentralize its treaty-making power by assigning some powers to the component units rather than to the federal government. The only position which SCELLE considers as intolerable, as "internationally unconstitutional", is the plea of a country such as the United States that some powers are no assigned at all and that it, therefore, cannot conclude certain categories of agreements at all, the member units being prohibited from entering into agreements, the federal government alleging its incompetence to conclude treaties dealing with subject matters otherwise under the control of the members (Nos. 174, 179). The policy consideration that a federal state should not be allowed to cripple its treaty-making power brings into focus the whole misery and grandeur of international law. At present SCELLE's argument ought to be addressed to municipal rather than international decision-makers. However, if a genuine world federalism should result from a change in today's sociological and institutional conditions, then SCELLE's views may yet come true.

140. No International Limitations upon the Federal Treaty-Making Power

The statement that the federal state is a fully sovereign state in international law seems to imply that the federal government may enter into agreements on any subject matter. NAWIASKY and ROSS have objected that, as a matter of theory, both the federal government and the member units should act and conclude treaties within their spheres of competence solely [7]. I question that this view is sound. The two authors acknowledge that their concept of the ideal federal state is a "pure" and abstract one. No federal state has ever known the ROSS-NAWIASKY system in practice. Federal unions have traditionally been characterized by a strong desire to achieve unity vis-à-vis other states [8]. If the member units insisted vigorously on preserving their external independence, then confederation, not federation, would suggest itself as the best form of linkage.

[7] H. NAWIASKY, Der Bundesstaat als Rechtsbegriff (1920) 109—10; A. ROSS, Lehrbuch des VR (1951) 96—99, 102—04.

[8] GHOSH 6—22, 40—74; HENDRY 17—35.

§ 2 *The Position of the Member Units of Federal States in International Law*

141. The Political Significance of the Problem

May members of a federal state possess a capacity to conclude agreements? The problem is of considerable political significance. Three situations are today most prominent:

(a) The precedent of the Ukrainian and the Byelorussian Soviet Socialist Republics. In 1944, the USSR amended its constitution so as to permit its member republics to set up diplomatic relations and conclude treaties with foreign states (Nos. 151, 152, 157). Thereupon the Ukraine and Byelorussia became members of the United Nations and other international organizations. Many observers consider this a dangerously convenient method for a federal state to multiply its voting power in international institutions through unilateral revisions of its constitution [1]. The international personality of the member units is here clearly an issue of interest to the international community.

(b) Quebec's recent desire to conclude agreements. Its initiative is a manifestation of the will to emphasize and maintain its predominantly French-catholic language, culture and education. In such a perspective, the agreement-making capacity of Canadian provinces appears to some as chiefly an internal Canadian problem. Others argue that Quebec's drive to achieve a special status will ultimately break up the federal union. Their fear need not necessarily be an idle speculation. The insistence of member units on maintaining some external relations is often a sign of internal tensions plaguing the federal union.

(c) The third situation can be illustrated by some arguments advanced in the Federal Republic of Germany and again in Canada. In both nations member units fear that the federal government will use its treaty-making power in order to enlarge its internal authority through a "bootstrap operation": the federal government could conclude treaties and then claim to be empowered to execute them even if the subject-matter is otherwise within the competence of the member units. Of course, it will be claimed that the federation has no authority to perform such treaties. The result will be that the central government cannot perform, whereas the members cannot conclude, treaties. How can this result be avoided? Some people consider a full treaty-making and -performing-

[1] In that sense E. DOLAN, The Member-Republics of the U. S. S. R. as Subjects of the Law of Nations, 4 ICLQ 629—36 (1955); E. JIMÉNEZ DE ARÉCHAGA in YBILC 1965 I 131, 245, 246.

power of the central government as a vital danger to the federal structure. The agreement-making power of the member units then offers itself as a handy remedy. The dispute about the agreement-making capacity of members of federal states is here again a predominantly internal problem; it stems more from distrust against the federal government than from a positive desire for self-assertion on the international plane.

142. The Legal Problem

The International Law Commission found in 1965 that, as a matter of empirical observation, the member units of some federal states concluded agreements. The Commission discussed whether in doing so the member units acted as organs of the federal state or in their own right, and whether the answer to that question depended on the provisions of the federal constitution or on international law [2].

On the one side stands the view that members of federal states cannot participate in the conduct of foreign relations in their own right. As far as they may participate, they obtain their capacity from the federal constitution and act as federal organs. Their rights stem exclusively from a decentralization of the federal foreign affairs power, and they do not possess any international personality apart from that of the federal state. This opinion is shared, for example, by KUNZ, BURCKHARDT, KELSEN, Sir GERALD FITZMAURICE, GHOSH and Sir HUMPHREY WALDOCK [3].

On the other side stands the view that it is a function of international law to determine its own subjects. It is not sufficient for a federal constitution to bestow agreement-making powers upon the member units. Whether members of federal states have capacity to conclude agreements depends also on their effective power to do so and on their recognition as subjects of international law by other such subjects. This is the opinion professed by VERDROSS, GUGGENHEIM, MOSLER, OPPENHEIM-LAUTERPACHT, BINDSCHEDLER, BERNHARDT, JIMÉNEZ DE ARÉCHAGA, REUTER, RUDA and MORIN [4]. In order to decide the dispute, it will be necessary to investigate what the concept of a subject of international law means and what the actual law in the different federal states is.

[2] YBILC 1965 I 23—30, 245—52, 280—81.

[3] J. KUNZ, Die Staatenverbindungen 664, 678—79 (1929); W. BURCKHARDT, Die Organisation der Rechtsgemeinschaft 154—55, 335—36, 365 (2d ed. 1944); H. KELSEN, 42 RC 171—72 (1932 IV); FITZMAURICE, Third Report, art. 8 (3), YBILC 1958 II 24, 32; GHOSH 74—85; WALDOCK, First Report, art. 3 (2), YBILC 1962 II 36—37.

[4] A. VERDROSS, 1 ÖZöR at 217—18, 395—98 (1946); P. GUGGENHEIM in SJK No. 385 I (1942); MOSLER, in Festschrift Thoma 131—32; 1 OPPENHEIM-LAUTER-

143. The Concept of Subject of International Law

Subjects of international law are those entities capable of possessing international rights and duties. Traditional theory, positivism and dualism have affirmed that only sovereign states could be such subjects[5]. The French realist school of DUGUIT, POLITIS and SCELLE, criticizing this view, has gone to the other extreme of asserting that international law was directed to individuals solely[6]. The weight of modern authority, however, favors — with varying emphasis — a third position[7]: in addition to sovereign states, also the Holy See, confederations and other international unions, governmental international organizations based on international agreements, belligerents, areas under protectorates, mandates or trusteeships, non-governmental international organizations, and even private associations and individuals may have capacity to possess international rights, functions and competences, and be subjects to international duties. Obviously, the position of each of these entities in international law differs vastly and would require a detailed examination. In its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations,* the International Court of Justice stressed that "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community"[8]. While the Court addressed itself to international organizations in general and to the United Nations in particular, its statement is equally applicable to the member units of federal states. A detailed inquiry into the rights of the member units and the needs of the international community must therefore be undertaken.

PACHT IL 176—77; BINDSCHEDLER, *supra* No. 136, 28—29; BERNHARDT 19—21; E. JIMÉNEZ DE ARÉCHAGA in YBILC 1965 I 131, 245, 246, 248, 251; P. REUTER *id.* at 246; J. M. RUDA *id.* 247; MORIN 144—47, 184—85.

5 *The S. S. Lotus,* P. C. I. J., Ser. A, No. 10 (1927), 18; 1 L. OPPENHEIM, IL, §§ 13, 63, pp. 18—19, 99—100 (1st ed. 1905); H. TRIEPEL, 1 RC at 80—82 (1923 I).

6 1 L. DUGUIT, Traité de droit constitutionnel 713—33 (3d ed. 1927); N. POLITIS, 6 RC at 5—10 (1925 I); 1 SCELLE, Précis 8—14, 42—44.

7 1 DAHM VR 70—74; C. TH. EUSTATHIADES, 84 RC 405—15 (1953 III); P. JESSUP, A Modern Law of Nations 15—42 (1948); H. KELSEN, 42 RC 141—72 (1932 IV); H. LAUTERPACHT, The Subjects of the Law of Nations, 63 Law Quarterly Review 438—60 (1947), 64 *id.* 97—119 (1948); MCDOUGAL, Studies 335—43; H. MOSLER, Die Erweiterung des Kreises der Völkerrechtssubjekte, 22 ZaöRV 1—48 (1962); 1 O'CONNELL, IL 79—82; VAN PANHUYS, Relations 61—71; CH. ROUSSEAU, DIP 75—76 (1953); W. SCHAUMANN, Die Gleichheit der Staaten 90—112 (1957); VERDROSS VR 188—91; W. WENGLER, Der Begriff des Völkerrechtssubjektes im Lichte der politischen Gegenwart, 51 FW 113—42 (1952); 1 WHITEMAN, Digest 35—58.

8 I. C. J. Rep. 1949 178.

144. Are Members of Federal States Subjects of International Law?

No member unit of any federal state is competent, under the terms of the federal constitution, to declare war, make peace, or conclude political alliances. No member unit sends permanent diplomatic envoys to, or receives them from, foreign nations (No. 151). The Ukraine and Byelorussia are represented in various international organizations, and Quebec has voiced its desire for some sort of such representation (No. 152). Most Swiss cantons and German *Länder,* some Canadian provinces, the Ukraine and Byelorussia have entered into non-political international agreements concerning local affairs (Nos. 157, 159, 167, 171), and these arrangements have commonly been considered as agreements in the meaning of international law. The constitutions of Austria, Yugoslavia, India, Malaysia, Argentina, Brazil, Mexico and Venezuela preclude the member units completely from any activity on the international plane. In no federal state is the treaty-making power coextensive with the legislative power (No. 181).

These are the facts. What about the legal construction[9]? Member units of federal states cannot be subjects of international law, unless the federal constitution permits them an external activity. Otherwise they are without relevance, internationally speaking. Insofar as the federal constitution can bar the member units' international activities, it may be said that the members are derivative, relative subjects of international law only, not original, necessary participants. To postulate (as do ROSS and NAWIASKY, [cf. No. 140]) that in all federal states the member units have inherent treaty-making capacity within the limits of their legislative competence, is to indulge in *Begriffsjurisprudenz* by preferring a purely theoretical viewpoint over the empirically observable realities. At best, the members have a restricted, derivative agreement-making capacity.

On the other hand, the claim that the member units conclude international agreements as organs of the federal government is historically and psychologically without foundation in most cases. The German *Länder* under the Constitution of the Empire of 1871, the Swiss cantons after 1848, and Quebec in the past few years wanted to act in their own names and to assert their own personalities. Broadly speaking the federal checks upon the agreement-making power of the member units do not

9 I follow here mainly BERNHARDT 5—24; 1 DAHM VR 172, 2 *id.* 127—28, 3 *id.* 11; W. MALLMANN, Völkerrecht und Bundesstaat, in 3 STRUPP-SCHLOCHAUER 640—50 (1962). See also GHOSH 74—85; F. KLEIN, Die mittelbare Haftung im VR 166—73 (1941); LAUTERPACHT, First Report, YBILC 1953 II 95, 138—39; MORIN 129—30, 144—47, 184—85; MOSLER, in Festschrift Thoma 129—72.

per se transform member treaties into federal treaties. In most cases the claim that the member units act as federal organs in their international relations is equivalent to the claim that the federal government should be internationally liable for the actions of member units. Such a responsibility, however, may exist even if the member acted in its own name (No. 146). Of course, the whole political context in a specific federal state may show a complete dependence of the member units upon the central government so that an impartial observer would be justified in calling the members merely decentralized federal organs. But by and large there is no reason to see in all external activities of member units actions of organs of the federal government.

Concepts such as those of presumption, delegation or *renvoi* do not contribute much to elucidate the problem. There is no *presumption* for or against international activity of the member units, just as there are no policy grounds for or against such an activity which would be *universally* valid. At best, presumptions may come into play on the level of municipal law, where due consideration can be given to all aspects of the domestic social context. A *renvoi* may be said to exist in the sense that international law leaves it to the federal constitution to determine whether the member unit may be externally active (No. 139). This amounts to holding (as I have held) that there is no presumption either way. But if the notion of *renvoi* should imply that municipal decision-makers alone can decide on the representation of federal member units in international organizations and on their participation in multilateral treaties, then it is inconsistent with the facts and wrong on policy grounds. The concept of *delegation* can be interpreted so as to mean that the federal constitution may preclude the members from external activity. So far, so good. The concept ceases to be meaningful, however, where it is argued that all member units act as federal organs.

The solution of the legal problem is actually at hand, as soon as dogmatic assertions about the relationship between international and municipal law are avoided, and the interaction and interpenetration of these legal spheres are instead recognized. The federal constitution creates the presuppositions about the international activity of the member units: it either prohibits or permits such activity or is silent.

(a) Assuming the constitution is permissive, the member units have still to be recognized as subjects of international law on the international plane. Here as elsewhere, recognition will involve consideration of both legal and political factors [10], *e. g.*, relative independence of the member

[10] See generally CH. DE VISSCHER, Théories et réalités 290—99.

unit, encouragement v. discouragement for federal pluralism, desirability of *de facto*-multiple voting force v. equality of nation-states. The act of recognition may be implicit in the recognition of the federal government. At any rate, both municipal and international decision-makers determine the existence and extent of the international activity of federal member units.

(b) Assuming the constitution remains silent, a mechanical invocation of presumptions does not suffice. International law will — as it does quite generally — rely on the effective distribution of internal powers in the federal state. Most likely a central government will claim that the conclusion of an international agreement with a member unit amounts to an intervention in the internal affairs of the federal state. It cannot be answered in the abstract whether or not such a claim would be well-founded. The answer must depend on earlier precedents, the authority of the central and the local government, the object and purpose of the agreement at issue, the secrecy of the negotiations, the good faith of the foreign nation, the terminability of the agreement and other factors.

145. The International Law Commission's and the Vienna Conference's Draft Convention on the Law of Treaties

In 1965, the International Law Commission proposed an article which read:

> States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

This article was adopted by 45 votes to 38, with 10 abstentions, at the First Session of the Vienna Conference on the Law of Treaties (1968) but, after a determined effort by the Canadian federal government aiming at its deletion, was voted down at the Second Session (1969) by 66 votes to 28, with 13 abstentions [11]. Indeed, the wording of the proposed article was hardly felicitous. The following grounds were invoked, *inter alia,* in order to delete it: (1) The Draft Convention covers only agreements

[11] YBILC 1965 I 23—30, 245—52, 280—81, 1966 II 191; cf. H. STEINBERGER, Constitutional Subdivisions of States or Unions and their Capacity to conclude Treaties, 27 ZaöRV 411—28 (1967); U. N. Conference on the Law of Treaties, Official Records, First Session, U. N. Doc. A/CONF. 39/11 (1969), pp. 59—69, 148—50; Draft Report of the Committee of the Whole on the First Session, U. N. Doc. A/CONF. 39/C. 1/L. 370/Rev. 1/Vol. I (1969), pp. 51—57; Provisional Summary Record of the 7th and 8th Plenary Meetings, U. N. Doc. A/CONF. 39/SR. 7 and 8 (5-6-1969).

between nation-states; to deal with agreements between member units of federal states would have been outside the scope of the Convention. (2) According to the proposed article, the federal "constitution" determined the treaty-making capacity of member units. It was not clear whether this included constitutional practice, supreme court decisions, or other internal law. (3) The proposed article did not say whether the federal government or the member units would be responsible for breach of member agreements. (4) The article was blamed as an attempt to interfere in the legal order of federal states, *i. e.,* in essentially domestic matters. However, it was also pointed out that internal law should not leave federal states free to establish subjects of international law, by endowing member units with agreement-making capacity.

What in the end was probably decisive was the fact that deletion of the article will not impair the agreement-making capacity of member units, while retention would have caused difficulties to some federal states. So the proposed article had to go.

§ 3 *International Responsibility in Federal States*

146. The Principle: International Responsibility of the Federal State

It is commonly acknowledged that the central governments is liable in international law for unlawful acts committed by the member units which it represents in external affairs. At its 1900 session, the Institute of International Law stated the rule as follows:

> Le gouvernement d'un Etat fédéral composé d'un certain nombre de petits Etats, qu'il représente au point de vue international, ne peut invoquer, pour se soustraire à la responsabilité qui lui incombe, le fait que la constitution de l'Etat fédéral ne lui donne sur les Etats particuliers ni le droit de contrôle, ni le droit d'exiger d'eux qu'ils satisfassent à leurs obligations [1].

[1] 18 A. I. D. I. (1900) 255, art. 4. See also *id.* 1927 III 147, 332—33, art. 9; Harvard Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, 23 AJIL Spec. Supp. 145, art. 3 (1929); Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 AJIL 548, 576 (1961), art. 2 (2), 17 (1) (b); L. N. Doc. C. 196. M. 70. 1927. V., pp. 95, 105; C. 75. M. 69. 1929. V., pp. 121—24; C. 75 (a). M. 69 (a). 1929, V., pp. 4, 21; J. BARTHÉLEMY, in 14 RGDIP 636—85 (1907); E. M. BORCHARD, The Diplomatic Protection of Citizens Abroad, § 82, pp. 199—202 (1922); 1 CAVARÉ DIP 422—26; 3 DAHM VR

Whenever the federal government itself enters into international agreements, the legal solution is obvious: the central government is directly responsible for the implementation of any such agreement, whether or not it has this implementing power under municipal law. This is simply a variation of the general principle that a state cannot adduce its own internal law as a defense in order to escape international obligations, — a principle for which there exists ample authority (Nos. 102—05).

The *Montijo* Arbitration (1875) is a good illustration: Umpire Bunch held Colombia responsible for damages resulting in 1871 from the seizure of the steamship Montijo by revolutionaries in Panama, then a department of the federal state of Columbia. An 1846 treaty had provided specifically that vessels belonging to citizens of the contracting parties should not be liable to seizure without compensation. Under this treaty, the umpire found, Colombia was responsible. "For treaty purposes the separate States are nonexistent" . . . "the duty of addressing the general government carries with it the right to claim from that government, and from it alone, the fulfillment of the international pact". . . "in such a case a treaty is superior to the constitution, which latter must give way. The legislation of the republic must be adapted to the treaty, not the treaty to the laws." [2]

The same principle was acted upon in the diplomatic dispute concerning the exclusion of Japanese pupils from the schools of San Francisco in 1906—07, where the federal government itself admitted that the action of California violated the treaty of 1894 with Japan [3].

147. Responsibility of Federal Member Units?

Where the member units are completely precluded from external relations by the federal constitution, they appear, from the point of view of international law, as mere decentralized state organs. Consequently,

111, 203—06; C. EAGLETON, The Responsibility of States in IL 32—34 (1928); H. V. EVATT, in 9 Australian L. J. Supp. 9—25 (1935); GHOSH 82—85, 234—48; KLEIN, *supra* No. 144, 165—209; I. v. MÜNCH, Das völkerrechtliche Delikt 239—50 (1963); 1 O'CONNELL IL 318, 2 *id.* 1046, 1071, 1093—94; 1 OPPENHEIM-LAUTERPACHT IL 339—40; M. V. POLAK in 1 ÖZöR 382—87 (1948); CH. ROUSSEAU DIP 358 (1953); M. SIBERT, in 44 RGDIP at 546—48 (1937); A. VERDROSS, in 1 ÖZöR 388—423 (1948).

[2] 2 MOORE, Int. Arb. 1421, 1439—40. See also 2 MOORE, Digest 1072—73, 6 *id.* 973—74; KLEIN, *supra* No. 144, 184—88, 192.

[3] BARTHÉLEMY, *supra* n. 1; E. ROOT, The Real Questions under the Japanese Treaty and the San Francisco School Board Resolution, 1 AJIL 273—86 (1907).

the federal government must answer for their unlawful acts and omissions. It would be erroneous, however, to conclude that the members can in no case be made internationally responsible. Where and so far as the member units are subjects of international law (No. 144), there is no reason of principle why they should not be held liable for torts and breaches of contracts[4]. Thus, if the only sanction provided in an agreement to which a member is a party is the suspension or non-execution of the terms of the agreement, such a sanction is naturally directed against the member, not against the federal government. To hold that the central government alone can be rendered liable in international law is tantamount with arguing that sanctions will ultimately always take the form of reprisal and war, which necessarily affect the federal state as a whole. Such a view on sanctions is no longer tenable in the face of the United Nations Charter's prohibition of the threat or use of force. — As a result, the question of the relationship between federal and member unit responsibility arises.

148. The Basis of Federal Responsibility

Explanations for the principle of federal responsibility have been sought in various theories[5]: thus it is said that the central government represents its members on the international plane and, therefore, can be held liable (ANZILOTTI'S so-called representation theory); or that its responsibility is the consequence of its control over member activities (AGO'S control theory); or that all sanctions against member units are bound to have repercussions on the federal state as a whole, so that the whole rather than the part only must answer for unlawful acts of the members (encroachment theory); or that liability follows from the federal protection which is granted to the members (protection theory); or that international responsibility is based on risk, not on fault, so that the central government can be rendered liable irrespective of its fault or negligence (POLAK'S risk theory).

Most of these theories contain useful elements which contribute to elucidate the nature and reason of federal responsibility. Basic, of course, is the need for security, stability and predictability in international transactions. Under the doctrine of the equality of nation-states, a federal state has no valid ground for pleading that its federal structure bars it from

[4] *Accord*: KLEIN, *supra* No. 144, 166—73, 194—99; v. MÜNCH, *supra* n. 1, 242—50; WENGLER, VR 276—78.

[5] For a succinct discussion of these theories, see POLAK, *supra* n. 1, and VERDROSS, 1 ÖZöR at 408—23 (1946).

living up to the terms of its treaties or other international obligations. If the federal constitution bestows some measure of international personality upon the member units, the members' agreements may provide that sanctions *(e. g.,* suspension of the operation of the agreement) will be directed against the members solely. In the absence of such a provision, both the benefits arising from the members' agreements and the diplomatic, economic or military sanctions taken against the members affect indirectly the federal state as a whole. It would, therefore, seem to be the correct solution to render the member unit directly and primarily responsible, to the extent that its international personality permits. If the member unit fails to remedy an unlawful situation, the federal government is liable indirectly and vicariously and may have to answer for the acts of its members before the International Court of Justice or other international arenas.

149. Alleged Transgressions of Treaty-Making Competence by Federal Government

Both the federal government and the member units might theoretically conclude treaties which they would not be competent to conclude under provisions of the constitution with a specific bearing on the federal structure. The problem has hardly ever arisen and is only rarely discussed in the literature[6]. To some extent, it is parallel to the case where an executive enters into treaties without obtaining the constitutionally prescribed consent of the legislature or a council of ministers (Nos. 74—100). Yet it is not governed by completely identical principles.

The federal government might transgress its authority either by (a) entering into treaties into which it may not enter under the terms of the constitution, or by (b) concluding treaties which it may lawfully conclude but not perform, or by (c) failing to obtain an approval of the member units which the constitution requires.

Two considerations are fundamental: first, the federal state is a fully sovereign state in international law (No. 138); second, a state, whether unitary or federal, cannot plead its domestic law as a defence for its non-fulfillment of international obligations (No. 146). It follows that international law does not restrict the treaty-making capacity of the federal government (No. 140). Moreover, not a single federal constitution contains an explicit provision which would prohibit the federal government

[6] But see BERNHARDT 12—16, 22—23; 1 CAVARÉ DIP 424—26; KLEIN, *supra* No. 144, 173—94; MALLMANN, *supra* No. 144, 647; MOSLER in Festschrift Thoma 164—68; STEINBERGER, *supra* No. 145, 424—28.

from concluding treaties with respect to subjects otherwise in the legislative competence of the member units. International law is therefore not concerned with those constitutional limitations on the treaty-making power of the federal government which establish specifically federal checks. It assumes that the federal government may conclude all sorts of international agreements irrespective of the internal distribution of legislative powers.

Once a valid agreement has been concluded, it must be performed, irrespective again of the internal treaty-implementing power of the federal government. This solution is sound on principle (No. 102) and is corroborated by the decision in the Montijo Arbitration and the outcome of the Japanese-Californian school exclusion dispute of 1907 (No. 146).

In *References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and The Limitation of Hours of Work Act*[7], the Supreme Court of Canada was asked to decide whether labor laws enacted by the Dominion Parliament in accordance with International Labor Conventions were valid under sections 132 and 91 of the BNA Act, despite the fact that each statute affected property and civil rights within the provinces. The court was evenly divided on the constitutionality of the implementing legislation (No. 160), but a majority held that the Dominion government and not the provinces was competent to conclude a treaty relating to property and civil rights[8].

Justice RINFRET dissented. Even if the Dominion government was the proper medium for all international relations, the ratifications were in his opinion null and void, because "the obligation should not be created or entered into before the provinces have given their consent thereto".[9] Justice CANNON also dissented, arguing that "foreign powers when dealing with Canada, must always keep in mind that neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92. Before accepting as binding any agreement under section 405 of the treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union".[10]

7 (1936) S. C. R. 461, (1936) 3 D. L. R. 673.
8 Duff C. J. (speaking also for Davis and Kerwin JJ.), at (1936) S. C. R. 488—89, 496; Crocket J. at 535.
9 At 511.
10 At 522.

On appeal the Privy Council left this point expressly open[11]. However, in accordance with most authoritative writers[12], I find the views of Justices RINFRET and CANNON unacceptable. Once a treaty has been ratified in due form, the other contracting parties do not have to be concerned about a federal government's power to perform and execute the treaty obligations. The question of notice raised by Justice CANNON can be relevant only for constitutional limitations on the power to *make* treaties, not for those on the power to *perform* treaties. Ratification stands for a promise to implement and observe the treaty faithfully. The federal government cannot escape its duties by pleading the deficencies of its municipal law (Nos. 102—05, 146).

150. Transgressions of Agreement-Making Competence by Member Units

The federal member units may overstep their authority either by (a) concluding agreements, for the conclusion of which the federal government is competent under the terms of the federal constitution, or by (b) concluding agreements, for the conclusion of which they are competent but need the prior approval of a federal agency.

The policy grounds which can be invoked in favor of the validity or invalidity of such agreements are basically the same as in the case of lack of legislative approval (Nos. 98—99): the need for security and reliability in international transactions, the protection of the good faith of the contracting parties, and the inconvenience and impropriety of making inquiries into the constitutional laws and practices of foreign nations ("non-intervention") support validity on the international plane. Requirements of democracy and constitutional government, as well as the difficulties of enforcing a municipally unconstitutional agreement speak in favor of invalidity. In addition to these grounds, it must be remembered that on the whole the federal state appears as a unity in its external relations (Nos. 136, 140), and that the international personality of the member units has a limited significance only (No. 180).

Where the member units enter into agreements without the requisite federal approval, the federal government should in any case not be held liable to the other contracting party, if the agreement is not properly executed. To hold otherwise would be plainly unjust.

11 (1937) A. C. 326, 349, 6 BILC 330.
12 HENDRY 58—61, 138—39; C. W. JENKS, 15 Can. B. Rev. 464—77 (1937); F. R. SCOTT, 15 Can. B. Rev. at 486—87 (1937); R. B. STEWART, 32 AJIL at 57—60 (1938).

As to the member units, two situations must be distinguished. First, the member unit may enter into an agreement dealing with matters otherwise within the unit's competence. Here it may be tolerable to consider the unit as bound and the agreement as insofar valid. If either party fails to execute the agreement, the other one can retaliate by ceasing execution in turn. Unless the agreement provides otherwise, this is in all likelihood the only available sanction. Second, the member unit enters into an agreement dealing with a matter otherwise within federal competence. Here voidability seems the correct solution. In no federal state have the member units ever been permitted to enter into agreements relating to federal affairs. In view of this fact, other nation-states need no special protection: agreements by which the member units encroach on sujects under federal competence are voidable at the option of the member or the federal government.

False informations may nevertheless render the federal state responsible under international law. If the federal government gives its assent to a member unit agreement, which deals with matters reserved to the federal legislature or executive, then it thereby acquiesces in the conclusion of such an agreement. The violation of the internal law, if any, can certainly no longer be considered as manifest. Rather, the good faith of the other contracting party would deserve protection: such agreements are valid.

CHAPTER 2

External Representation in Federal States

151. The Sending and Receiving of Diplomats and Consuls

With minor exceptions, all federal constitutions place the appointment of diplomatic and consular officials and the reception of foreign diplomatic personnel (the so-called *ius legationis*) in the hands of the federal government [1] (constitutions of Argentina art. 86 Nos. 10, 14; Austria art. 10 No. 2; Brazil art. 5 No. 1, 87 No. 6; Germany art. 32 [1], 59 [1]; India 7th Schedule, List I, Nos. 11—13; Malaysia 9th Schedule, List I, No. 1 [c] + [d]; Mexico art. 89 [3]; Switzerland art. 10; USA art. I sec. 10 §§ 1, 3; art. II sec. 2; Yugoslavia Fundamental Law 1953 art. 9, 71 Nos. 1, 4, 5). Indeed federal competence seems desirable, if the

1 1 CAVARÉ DIP 420—21; 1 OPPENHEIM-LAUTERPACHT IL 176, 774, 835; SOHN-SHAFER 239—40, 241—43, 244—46.

federal government is to maintain control over the conduct of external affairs. Among the reasons for centralized diplomatic representation abroad are: greater strength and authority; easier manoeuvrability and more flexibility; no risk of exploitation by foreign nations of economic, ideological, factional or religious divergencies and rifts within the federal state; no unnecessary duplication of diplomatic representation; in short, "the peace of the *whole* ought not to be left at the disposal of a *part*" [2]. These reasons may also apply to cultural and consular representations, but not to the same degree. It may be just as advantageous for the federation to provide for an outlet for provincial particularism, traditions and emotions, by conceding to them a carefully limited right to send and receive some diplomatic envoys.

Do the federal constitutions provide for such outlets? No, in the United States and Switzerland. In the *Chinese Exclusion Case,* Justice Field declared for the American Supreme Court that "for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power" [3]. And in 1916, the Swiss Federal Council informed the canton of Berne that "The cantonal authorities have no right to entertain direct relations with foreign legations" [4].

Under the Constitution of the German Empire of 1871 (art. 4 No. 7, 11, 56), the *Länder* could send and receive diplomatic agents to foreign nations. Thus Bavaria and Saxony had ambassadors in Paris and Vienna. Moreover, the *Länder* could receive foreign consuls. The German consular service abroad, however, was unified. The Weimar Constitution of 1919 assigned both diplomatic and consular activities to the federal government (art. 45 I, 78 I). But the *Länder* were allowed to maintain diplomatic relations with the Holy See. The situation is exactly the same under the Basic Law of the Federal Republic of Germany (art. 32 I, 59 I) [5].

In the USSR, a constitutional amendment of 1944 granted to all Union Republics "the right to enter into direct relations with foreign states, to conclude agreements and exchange diplomatic and consular representatives with them" (art. 18 a). Thereafter, the Ukrainian and Byelorussian Soviet Socialist Republics became members of various inter-

2 The Federalist No. 80. See also *id.* Nos. 3—5, 9—11, 42.

3 *The Chinese Exclusion Case,* 130 US 581, 606 (1889). For elaboration see No. 174.

4 BURCKHARDT, I Bundesrecht No. 92 I.

5 T. MAUNZ / G. DÜRIG, Kommentar zum Grundgesetz, art. 32 nn. 12—14, art. 59 n. 4 (1961). Compare J. KÖLBLE and R. BECK, Auslandsbeziehungen der Länder, DÖV 1965 145—54, 1966 20—30; SOHN-SHAFER 245—46, 277—80.